

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of Richard Tom Fitzgerald

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

The above matter came on for a prehearing conference before Administrative Law Judge Barbara L. Neilson on August 25, 2005 at 1:30 p.m. at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-02130, appeared on behalf of the Department of Commerce. There was no appearance by or on behalf of the Respondent, Richard Tom Fitzgerald, 5227 Beaver Street, White Bear Lake, Minnesota 55110. The Department requested a default recommendation due to the Respondent's failure to appear at the prehearing conference. The OAH record closed at the conclusion of the prehearing conference on August 25, 2005.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of the Commissioner of Commerce, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to find out about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

This case presents the following issues:

Did the Respondent violate Minn. Stat. § 45.027, subd. 7(3) and (4) by providing false information to the Department concerning his criminal history?

Did the Respondent violate Minn. Stat. § 82.39, subd. 5, by failing to notify the Commissioner in writing within 10 days of being charged with and entering a plea of guilty to a felony?

Did the Respondent convert funds provided by a seller of real estate and thereby engage in fraudulent, deceptive and dishonest practices in violation of Minn. Stat. §§ 82.41, subd. 13, and 82.35, subd. 1(b) and demonstrate untrustworthiness in violation of Minn. Stat. § 82.35, subd. 1(f)?

Is discipline of Respondent in the public interest?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent is currently licensed as a real estate salesperson, License No. 20314490.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges initiating this contested case proceeding was served on the Respondent via first class mail on July 11, 2005, at the following address: 5227 Beaver Street, White Bear Lake, MN 55110.^[1]

3. The Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges contained the following language:

Respondent's failure to appear at the prehearing conference may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that its proposed disciplinary action may be upheld.^[2]

4. The Respondent did not make any request prior to the August 25, 2005, prehearing conference for a continuance or any other relief. The Respondent did not personally appear at the prehearing conference in this matter scheduled for August 25, 2005, or have an appearance made on his behalf.

5. Because the Respondent failed to appear at the prehearing conference in this matter, he is in default.

6. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Statement of Charges included in the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges are hereby taken as true and incorporated into these Findings of Fact.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 45.027, and 82.35, subd. 5.

2. The Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges issued by the Department was proper and the Department has fulfilled all relevant procedural requirements of law and rule.

3. The Respondent, having made no appearance at the prehearing conference, and not requesting any continuance or other relief, is in default. Pursuant to Minn. Rules part 1400.6000, the allegations contained in the Statement of Charges included in the Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges are hereby taken as true.

4. By providing false information to the Department concerning his criminal history, failing to notify the Commissioner in writing within 10 days of being charged with and entering a plea of guilty to a felony, and converting funds provided by a seller of real estate, the Respondent has violated Minn. Stat. §§ 45.027, subd. 7(3) and (4), 82.35, subd. 1(b) and (f), 82.39, subd. 5, and 82.41, subd. 13. The Respondent's license is subject to discipline and the Respondent is subject to censure and/or civil penalties pursuant to Minn. Stat. §§ 45.027, subds. 6 - 7, and 82.35, and the imposition of sanctions is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Commerce take appropriate disciplinary action against the real estate salesperson's license of the Respondent, Richard Tom Fitzgerald, censure the Respondent, and/or impose an appropriate civil penalty against the Respondent.

Dated: September 23, 2005

s/ Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

Reported: Default.

^[1] Affidavit of Service by First Class Mail of Jean-Anne Gates, appended to Notice of and Order for Hearing.

^[2] Notice of and Order for Hearing at 4, ¶ 1.